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No. 79-1047

In the Supreme Court of the United States

OCTOBER TERM, 1979

LEO MIROFF and JANE FRANCES POWERS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 606 F.2d 777.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1979. A petition for rehearing was denied on December 5, 1979. The petition for a writ

of certiorari was filed on January 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, the warrantless search of a garment bag and a plastic garbage bag violated petitioners' Fourth Amendment rights.

2. Whether evidence that two guns had been found in petitioners' room was improperly admitted.

3. Whether extrinsic-crime evidence was improperly admitted.

4. Whether certain testimony was so prejudicial as to require reversal, even though it was stricken from the record.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of transporting stolen property in interstate commerce, in violation of 18 U.S.C. 2314 and 2(b). In addition, petitioner Miroff was convicted of conspiring to commit that offense, in violation of 18 U.S.C. 371.[1] Petitioner Miroff was sentenced to one year's imprisonment to be followed by three years' probation. Petitioner Powers was sentenced to six months' imprisonment to be followed by four and one-half years' probation. The court of appeals affirmed (Pet. App. 1a-13a).

[1] Petitioner Powers was acquitted on the conspiracy count.

1. The evidence showed that at a meeting on January 8, 1973, in Melrose Park, Illinois, Harry Aleman, Louis Almeida, and Leonard Foresta [2] discussed plans for the robbery of the Indianapolis, Indiana home of Dr. Robert Messinger. Aleman stated that he had received a "tip" about the house from petitioner Miroff and that he wanted Almeida and Foresta to rob it (Tr. 13-14, 19-24; Pet. App. 2a).

The following evening Almeida and Foresta met with Miroff and his girlfriend, petitioner Powers, at Miroff's apartment in Indianapolis, and that evening they discussed the robbery (Tr. 34-38). Miroff then drove them to the Messinger house, stating that he and Powers had devoted a lot of time and effort to obtaining information about the house (Tr. 38-39). The next day, Miroff and Almeida went to a shopping plaza where Almeida stole an Indiana license plate (Tr. 40). The following morning Almeida and Foresta stole a second Indiana license plate and put it on Foresta's car (Tr. 41-42). When they returned to Miroff's apartment, Miroff and Powers told them how to gain entry to the Messinger house, and they dis-

[2] Harry Aleman and Leonard Foresta were convicted in a separate trial of participation in the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c)), conspiracy to commit that offense (18 U.S.C. 1962(d)), and interstate transportation of stolen property (18 U.S.C. 2314), growing out of the robbery in Indiana that formed the basis of the conviction in the present case and two other robberies. Their petition for a writ of certiorari raising issues unrelated to the present petition is now pending. *Aleman and Foresta* v. *United States*, No. 79-1009.

cussed where they would meet after the robbery (Tr. 42-43).

The four then drove in two cars to a shopping center approximately one mile from the Messinger house. From there, Almeida and Foresta went to the house, where Foresta went to the front door and briefly talked to the maid (Tr. 43-46, 154-156). They then returned to the shopping center where Miroff and Powers were waiting and told them that the maid was the only person in the house (Tr. 46).

At approximately 12:30 a.m., Almeida and Foresta returned to the house and gained entry by posing as CIA agents. Brandishing pistols, they tied the maid up and seized furs, jewelry, and cash worth approximately $25,000 (Tr. 46-49, 54, 56, 156-165; Pet. App. 2a). The four spent the night at Miroff's apartment and left the next morning for Aleman's house in Melrose Park. There, arrangements were made for dividing the proceeds of the robbery (Tr. 58, 60, 68, 76).

2. Prior to trial, petitioners moved to suppress the items stolen from the Messinger house and other evidence on Fourth Amendment grounds. The evidence adduced at the suppression hearing (see Pet. App. 2a-5a) showed that on January 19, 1973, petitioners offered to sell a federal undercover agent certain stolen radios that were not part of the loot of the Indianapolis robbery. On January 26, federal agents and local police officers went to the residence of Robert Harder and his wife to arrest Harder, Miroff, and Powers for possession of the radios. At the time, Miroff and Powers were guests in the Harder house,

temporarily occupying the downstairs bedroom. The Harders kept personal belongings in closets and drawers in the bedroom, including clothing, pictures, and papers. The bedroom door had no lock on it, and petitioners had no key to the house.[3]

Upon the officers' arrival at the house, Harder admitted them and gave them permission to search the bedroom occupied by petitioners. At one point in the testimony at the hearing, one of the officers stated that Harder had told them that "[w]hatever was in the bedroom belonged to Mr. Miroff." This was obviously not the case, because the Harders' own clothing was found in the bedroom closet; however, it did appear that all of petitioners' possessions were located in the bedroom. The officers searched the room and found several shopping bags containing radios and electric-shavers. Inside the closet, they found a garment bag containing jewelry, approximately $1,000, and two guns. On the floor of the closet they found a plastic garbage bag containing furs, and two Indiana license plates.[4] Finally, on the night stand adjacent to the bed, the officers found an address book and some papers listing each item of jewelry found in the gar-

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[3] About a week prior to the service of the arrest warrants, the police had come to the Harder home, and petitioners had left with them. When petitioners returned to the house, Harder told them that he and his wife did not want anything in the house that had been stolen. Petitioners stayed on with the understanding there was no stolen property in the room (Pet. App. 2a).

[4] The garbage bag was found untied (July 18, 1978 Tr. 26).

ment bag and its estimated worth (see July 18, 1978 Tr. 24-30, 45-49; Pet. App. 3a).

ARGUMENT

1. Petitioners appear to concede (Pet. 8, 12) that Harder could properly consent to a search of the bedroom,[5] but they contend (Pet. 6-12) that Harder had no authority to consent to the warrantless searches of the garment bag and the untied plastic bag and that these searches were therefore invalid. This claim is unfounded. Petitioners could not, in the circumstances of this case, have entertained a reasonable expectation of privacy in the contents of the bags sufficient to implicate their Fourth Amendment rights. Indeed, we doubt that a garbage bag—especially an untied one—is subject to a reasonable expectation of privacy in any circumstance. See *United States* v. *Neumann*, 585 F.2d 355, 360-361 (8th Cir. 1978); *United States* v. *Block*, 590 F.2d 535, 541 n.8 (4th Cir. 1978); compare *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), slip op. 11 n.13.

Moreover, the evidence indicates that the garment bag was hung in the bedroom closet among the Harders' own clothes when the officers found it, and the garbage bag was on the closet floor. It was

[5] Harder's right to consent to the search of the bedroom and closet is apparent because, at the very least, he possessed joint authority over those areas. See *United States* v. *Matlock*, 415 U.S. 164, 171 & n.7 (1974); *United States* v. *Block*, 590 F.2d 535, 539-540 (4th Cir. 1978); *United States* v. *Richardson*, 562 F.2d 476, 479-480 (7th Cir. 1977).

not apparent that these bags—unlike, for example, the suitcase on the bedroom floor (July 18, 1978 Tr. 44)—belonged to petitioners. Having thus neglected adequately to separate their property from that of the Harders, petitioners could not reasonably have expected that, in the event the Harders consented to a search of the closet, the bags would remain unexamined. In making consensual searches, the police are not required to ascertain the ownership or custody of every article or space in the premises searched. *United States* v. *Robinson*, 479 F.2d 300, 303 (7th Cir. 1973); see *Frazier* v. *Cupp*, 394 U.S. 731, 740 (1969).

Moreover, petitioners knew that the Harders suspected that they were concealing stolen property in the room; indeed, the Harders had specifically warned them not to do so. Their continued presence in the house, as the court of appeals observed (Pet. App. 4a), was contingent on their keeping no stolen property there. Accordingly, petitioners could have been under no illusion that the contents of the bags were secure from any attempt by the Harders to determine if they were abiding by the conditions of their stay. Having made no attempt to protect the bags from the scrutiny of the Harders, petitioners assumed the risk that the Harders might allow someone else to look at items in the room, *Frazier* v. *Cupp*, 394 U.S. at 740; accordingly, they possessed no reasonable expectation of privacy with respect to them. It would have required nothing less than a locked container to permit such an expectation in these circumstances. See

Holzhey v. *United States*, 223 F.2d 823 (5th Cir. 1955).

The cases upon which petitioners rely do not aid their cause. The suitcase in *United States* v. *Wilson*, 536 F.2d 883 (9th Cir. 1976), and the footlocker in *United States* v. *Block*, *supra*, were not intermingled with the property of the person consenting to the search, and it was obvious the property did not belong to that person. Moreover, in neither case did the defendant entertain a diminished privacy expectation based on the known suspicions of others with whom he shared the premises. Indeed, the footlocker in *Block* was secured and had to be forced open by the officers. In *United States* v. *Isom*, 588 F.2d 858 (2d Cir. 1978), the court stated that as a general rule "[g]uests have a justifiable expectation * * * that the contents of *locked* articles that they bring to the host's premises will remain private" (588 F.2d at 861; emphasis added). Petitioners do not contend that the bags in this case were comparably secured.[6] In any event, the court upheld the search of the defendant's locked box in *Isom* because the police had no

[6] Petitioners also contend (Pet. 12) that the police lacked probable cause to seize the contents of the bags because they had no knowledge that any of the items had been stolen. But, as the court of appeals concluded (Pet. App. 5a), "once the officers found the radios and electric shavers in the shopping bags, jewelry, almost $1000 in $20 bills and two guns in a garment bag, furs with someone else's name sewed inside them in plastic garbage bags, and the handwritten list of jewelry, the officers had adequate probable cause to seize the items."

basis for believing the consenter's authority did not extend to it.

2. During his direct testimony, one of the police officers was asked what had been seized in the Harder bedroom. Among the things he listed were the two guns found in the garment bag. Petitioners objected, and the court overruled the objection (Tr. 191-193). Petitioners contend (Pet. 20-24) that this ruling was error.

Rule 403, Fed. R. Evid., commits to the trial court's discretion the weighing of the probative value and possible prejudicial impact of proffered evidence. Here, as the courts below concluded (Pet. App. 8a-9a), the testimony concerning the guns was probative. Petitioners were charged in the conspiracy count with, among other things, conspiring to commit a robbery and to "induce fear in and commit violence upon their intended victims by the use of firearms" (July 28, 1978 Tr. 53). Since the possession of handguns is consistent with this kind of activity, the jury was entitled to consider the evidence of the guns—especially in view of the fact that the weapons were found in the garment bag along with the stolen property. See *Moore* v. *Illinois*, 408 U.S. 786 (1972); *United States* v. *Stone*, 471 F.2d 170, 172-173 (7th Cir. 1972), cert. denied, 411 U.S. 931 (1973); *United States* v. *Wiener*, 534 F.2d 15, 17-18 (2d Cir.), cert. denied, 429 U.S. 820 (1976).

Moreover, the officer's testimony did not in any way emphasize the guns; he simply mentioned that guns were among the items found in the garment bag. This "incidental testimony", as the court of appeals

characterized it (Pet. App. 9a), was plainly not so prejudicial as to require reversal, particularly in view of the strong evidence of petitioners' guilt.[7]

3. Over petitioners' objection, a federal agent was permitted to testify that on January 19, 1973—eight days after the robbery of the Messinger house—petitioners offered to sell him stolen radios. The agent also testified that when he and other law enforcement agents went to the Harder residence on January 26, they intended to arrest petitioners for possession of the stolen radios seen at the January 19th meeting (Tr. 247-250). The district court instructed the jury (Tr. 245-246) that this testimony was being received for the sole purpose of establishing that petitioners knew the items they had transported in interstate commerce were stolen. Although they concede that criminal intent or knowledge may be proven by evidence of other crimes under Fed. R. Evid. 404(b), petitioners contend that the agent's testimony was

[7] The cases upon which petitioners rely (Pet. 21-23) are inapposite. In *Moody* v. *United States*, 376 F.2d 525, 530-532 (9th Cir. 1967), *United States* v. *Warledo*, 557 F.2d 721 (10th Cir. 1977), and *United States* v. *Reid*, 410 F.2d 1223 (7th Cir. 1969), the evidence of the weapon was extensive and emphasized; indeed, in *Moody* and *Warledo*, the gun itself was admitted into evidence. In *United States* v. *Robinson*, 544 F.2d 611, 619-620 (2d Cir. 1976), a panel of the court of appeals concluded that the admission of testimony that the defendant possessed a gun at the time of his arrest for bank robbery was reversible error because, unlike here, the government's case was extremely weak. In any event, the en banc court reached the opposite conclusion in that case and affirmed the conviction. 560 F.2d 507 (2d Cir. 1977), cert. denied, 435 U.S. 905 (1978).

inadmissible because petitioners had not contested their knowledge that the articles were stolen (Pet. 13-16) and because the attempted sale of the radios occurred subsequent to the crimes charged in this case (Pet. 16-20). These claims are without merit.

It is an essential element of the crime of transporting stolen property in interstate commerce that the defendant knew the property was stolen. See *United States* v. *Solomon*, 422 F.2d 1110, 1112 (7th Cir.), cert. denied, 399 U.S. 911 (1970); *Pauldino* v. *United States*, 379 F.2d 170, 172 (10th Cir. 1967). Petitioners' failure to contest their guilty knowledge did not relieve the government of its burden of proving this element of the offense beyond a reasonable doubt.[8] Because the government thus had a legitimate need for the extrinsic-crime evidence (see *United States* v. *Weidman*, 572 F.2d 1199, 1202 (7th Cir.), cert. denied, 439 U.S. 821 (1978)), the district court did not abuse its discretion in admitting it. This is especially clear here since the court carefully apprised the jury of the limited purpose for which the evidence could be considered,[9] and the evidence of petitioners' guilt (see pages 3-4, *supra*) was overwhelming.[10]

[8] The Advisory Committee Notes to Fed. R. Evid. 401 indicate that the rules contain no "requirement that evidence is admissible only if directed to matters in dispute."

[9] This cautionary instruction was repeated in the court's final charge (July 28, 1978 Tr. 50).

[10] This case is unlike those relied upon by petitioners. In *United States* v. *Adams*, 385 F.2d 548 (2d Cir. 1967), the conviction was reversed on other grounds, and the court merely discussed the question of admissibility of extrinsic-

Nor is there merit to petitioners' claim that the extrinsic-offense evidence lacked relevance merely because it was committed after, rather than before, the charged offense.[11] The relevancy of extrinsic-crime evidence is to be judged under the standard set forth in Fed. R. Evid. 401, which provides that evidence is relevant when it has "any tendency to make the

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crime evidence consisting of conversations concerning a possible drug transaction that never took place. In *United States* v. *Broadway*, 477 F.2d 991 (5th Cir. 1973), the court held that the extrinsic offense was inadmissible not because the element it was introduced to prove was uncontested—in fact, it was contested—but because the two offenses were not sufficiently similar. To the extent petitioners rely on the Seventh Circuit's prior decision in *United States* v. *Fierson*, 419 F.2d 1020 (1969), they suggest a conflict among different panels of the same circuit. Such a conflict does not warrant review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

[11] For this position petitioners rely principally on *United States* v. *Boyd*, 595 F.2d 120 (3d Cir. 1978). There, the court, in ruling that evidence of a subsequent crime had been improperly admitted under Rule 404(b), stated that "[t]he logic of showing prior intent or knowledge by proof of subsequent activity escapes us." 595 F.2d at 126. This view finds no support in the Rules of Evidence or the cases construing them, and is in direct conflict with prior decisions of the Third Circuit. See *United States* v. *Bey*, 437 F.2d 188, 191 (3d Cir. 1971); *United States* v. *Laurelli*, 293 F.2d 830, 832 (3d Cir. 1961), cert. denied, 368 U.S. 961 (1962). Indeed, since the decision in *Boyd*, the Third Circuit has upheld the admission of subsequent crime evidence under Fed. R. Evid. 404(b). See *United States* v. *Milhollan*, 599 F.2d 518, 524 (3d Cir. 1979). In the other cases cited by petitioners evidence of the extrinsic crime was held inadmissible for reasons having nothing to do with the fact that it occurred after the charged offense.

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the testimony that petitioners were dealing in radios they knew to be stolen only eight days after transporting other stolen property in interstate commerce surely tended to show that they also knew that property was stolen. No more was required to support the trial court's determination that it was relevant.

4. On several occasions during the trial, a government witness gave testimony that was stricken by the court on motion of the defense. Two of the incidents involved the witness Almeida, who was one of the participants in the robbery. On one occasion, he testified that Foresta told him that petitioner Miroff "used to give him tips on scores to make" (Tr. 31). On another occasion, Almeida testified that Miroff told him that petitioner Powers "was a stand-up broad and that she shot her husband, something like that" (Tr. 35-36). In a third incident, a detective, in setting forth his duties, testified that his responsibility was "with the known thieves, professional thieves" (Tr. 266). Petitioners contend (Pet. 24-29) that this testimony was so prejudicial as to compel reversal of their convictions.

In view of the district court's prompt and decisive action to negate prejudice by striking the answers, reversal is not required. As this Court stated in *Bruton* v. *United States*, 391 U.S. 123, 135 (1968), "[n]ot every admission of inadmissible * * * evidence can be considered to be reversible error unavoidable

through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently." Here, in addition to its immediate action in striking the testimony, the court advised the jury early in its final charge that the jury should "disregard * * * testimony which the Court has refused or stricken" (July 28, 1978 Tr. 44). Moreover, there is no indication that the government deliberately elicited the answers. In any event, this case was plainly not so close that the offending testimony could have been a decisive factor.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] In *Odom* v. *United States*, 377 F.2d 853, 859 (5th Cir. 1967), and *United States* v. *Clarke*, 343 F.2d 90 (3d Cir. 1965), the courts acknowledged that, in general, an erroneous admission of evidence is cured by instructing the jury to disregard it, especially where, as here, guilt is clear. In *United States* v. *Reed*, 376 F.2d 226 (7th Cir. 1967), the court, while sustaining defendant's objection to the offending testimony, apparently neglected to instruct the jury to disregard it (*id.* at 228).

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